(1)

Supreme Court, U.S.
FILED

No. 98 1793 MAY 4 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

HOWARD W. KOLB,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Ninth District

PETITION FOR WRIT OF CERTIORARI

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24P

QUESTIONS PRESENTED

1. Whether Petitioner's guilty plea to a charge of Marijuana possession together with an allegation that Petitioner "used a deadly weapon to wit: a firearm" was constitutionally invalid?

2. Whether this Court's decision in *Bailey v. United States*, 516 U. S. 137 (1995) modifies or changes the Texas Court of Criminal Appeals' ruling in *Patterson v. State*, 769 S. W. 2d 938, 941 (Tex. Crim. App. 1989) upon which the Court of Appeals relied?

3. Whether the Due Process Clause of Fourteenth Amendment requires a post conviction evidentiary hearing on direct appeal as to the constitutional validity of Petitioner's guilty plea?

LIST OF PARTIES

The parties to the proceeding are:

1) HOWARD W. KOLB, a resident of Havana, Florida

2) The State of Texas

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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. A copy of this opinion is found at Appendix "A". The orders of the Court of Criminal Appeals are unpublished but are contained in Appendices "C" and "D".

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1998. A motion for rehearing was denied in that Court on May 21, 1998. Petitioner filed a Petition for discretionary Review with the Court of Criminal Appeals in Austin, Texas. This petition was refused on December 2, 1998 with one judge stating that he would grant it. Motion for Rehearing was denied by the Court of Criminal Appeals on February 3, 1999. This Court has jurisdiction under 28 U.S. Code § 1257(a). In any event, Petitioner requests that this Court waive the rule, if necessary.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments to the United States Constitution

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . "

Amendment XIV

" . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

This case also involves the following statutes:

TEXAS PENAL CODE § 12.35(C)(1)

"An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by § 1.07 was used or exhibited during the commission of the offense or during the immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited."

TEXAS PENAL CODE § 1.07(a)(ii)(A)

"Deadly weapon means:

(A) A firearm or anything designed, made, or adapted for the purpose of inflicting death or serious bodily injury".

STATEMENT OF THE CASE

This case involves a state criminal case which questions the constitutional validity of a guilty plea. Petitioner plead guilty to possession of marijuana with an allegation of use of a deadly weapon to wit: a firearm. During the plea hearing the following exchange took place:

THE COURT: And did you actually commit every act that I've told you they charged you with in this indictment?

DEFENDANT: I didn't use a firearm. I had one, but yes, yes, yes, I was in possession of a firearm. **(R. R. Vol. 2., pp. 4-5)**

After receiving a presentence report, the trial court sentenced Petitioner to five (5) years confinement in the Texas Department of Criminal Justice.

On Appeal, Petitioner urged that under Texas law that simple possession of a firearm was not "use" of a firearm and his guilty plea was not voluntary or knowing under the due process clause of the United States and Texas constitutions.

The Court of Appeals rejected these arguments holding that there " . . . is no evidence in the record to establish that Kolb did not use the firearm in the commission of the felony. [a]ccordingly, we are unable to determine whether Kolb pleaded guilty to a crime which he did not commit." (page 4, Appendix "A")

Whereupon, Petitioner timely filed a Motion for Rehearing with the Court of Appeals where Petitioner urged the proposition that due process requires that Petitioner have a posttrial evidentiary hearing on the voluntariness of his plea. (Motion for Rehearing, page 4.) The Court of Appeals overruled the Motion for Rehearing.

Next, Petitioner sought discretionary review from the Court of Criminal Appeals in Austin Texas, the highest state court for criminal matters. Petitioner raised four grounds for review:

1) Whether simple possession of a firearm constitutes use of a firearm under § 12.35 of the Texas Penal Code.

2) Whether the Supreme Court's decision in *Bailey v. United States,* changes or modifies the Court's decision in *Patterson v. State.*

3) Whether the plea was involuntary under the due process clauses of the Texas and United States Constitution.

4) Whether Petitioner was entitled to a posttrial evidentiary hearing on the voluntariness of his plea.

Although one judge stated that he would grant review, the Court of Criminal Appeals denied the petition for discretionary review. Later, the Court of Criminal Appeals on February 3, 1999 denied a motion for rehearing on the matter.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S GUILTY PLEA IS CONSTITUTIONALLY INVALID

A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent". *Brady v. United States,* 397 U.S. 742, 748 (1970). A plea does not qualify as "intelligent" unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith v. O'Grady,* 312 U.S. 329, 334 (1941). If neither defendant, nor his counsel, nor the trial court

correctly understood the essential elements of the crime with which defendant was charged, defendant's guilty plea would be invalid under the due process clause. *Bousley v. United States*, ___ U.S. ___, 118 S.Ct. 1604, 1609 (1998).

In this case, it is obvious that Petitioner was confused about the various elements comprising the crime with which he was charged. At that point, the trial court should have questioned Petitioner to ensure that Petitioner understood the law in relation to the facts. See *McCarthy v. United States*, 394 U.S. 459, 466-467 (1969). A plea is not voluntary if the accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *McCarthy*, 394 U.S. at 465 note 13. The trial court failed to adequately ensure that Petitioner understood the charge to which he was pleading guilty. This Court has held that where the record does not show that a guilty plea met these constitutional requirements, the plea was held invalid. *Henderson v. Morgan*, 426 U.S. 637, 647 (1976); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Therefore, the trial court had the duty to reject the plea and allow Petitioner to seek a jury trial.

II. THIS COURT'S DECISION IN *BAILEY V. UNITED STATES* MODIFIED THE EXISTING STATE LAW IN THIS CASE.

The Court of Appeals cited in its opinion the court of Criminal Appeals decision of *Patterson v. State*, 769 S.W. 2d 938 (Tex. Crim. App. 1989) for the proposition that use of a deadly weapon under Texas law may include its

simple possession if such possession facilitates the associated felony. *Patterson*, 769 S.W.2d at 941. *Patterson* heavily relied on 18 U.S. Code § 924 (c)(1) and the Eighth Circuit Court of Appeals decision in *United States v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985). The *Patterson* court was construing a different statute with similar language: Article 42.12, Texas Code of Criminal Procedure, § 3g(a)(2). *Patterson* held in the context of Article 42.12 that use of a deadly weapon can encompass its simple possession.

However, this Court in *Bailey v. United States*, 516 U.S. 137 (1995) overruled decisions such as *La Guardia* holding mere possession does not constitute "use" pursuant to 18 U.S. Code § 924(c)(1) *Bailey Id.*

Many states such as Texas passed legislation somewhat similar to 18 U.S. Code § 924 prohibitng the use or exhibition of firearm in the commission of a felony. This Court will revisit the question of whether *Bailey* may have affected construction of state law.

Section 12.35 of the Texas Penal Code has not been construed by the Texas Court of Criminal Appeals, the Texas Court of Criminal Appeals, the state's highest criminal court. That court refused review in this case. Construction of that law could affect the question of whether Petitioner validly pled guilty. See *Bousley* ___ U.S. ___, 118 S.Ct. at 1612. As an alternative, this Court can certify a question to the Texas Court of Criminal Appeals in Austin, Texas to wit: whether mere possession of a firearm constitutes "use of a deadly weapon" under § 12.35 of the Texas Penal Code. See Rule 74, Texas Rules of appellate Procedure. If affirmatively answered, Petitioner's plea was involuntary. See *Bousley Id.*

III. THIS COURT SHOULD DECIDE THE QUESTION OF WHETHER DUE PROCESS REQUIRES A POST CONVICTION EVIDENTIARY HEARING ON THE VOLUNTARINESS OF THE GUILTY PLEA.

Before the Court of Appeals, Petitioner urged that since the Court of Appeals held that "no evidence" in the record supported his assertions that the plea was involuntary, Petitioner should have an evidentiary hearing on his voluntariness claim. (Motion for Rehearing, Court of Appeals, p. 4).

The voluntariness of a plea implicates the due process clause and constitutes an important constitutional question. *See e.g., Henderson v. Morgan,* 426 U.S. 637 (1976). The importance of a guilty plea in the administration of criminal justice cannot be understated. A criminal defendant who has admitted in open court that he is guilty may not raise claims about constitutional rights violations which occur prior to the entry of the guilty plea; the defendant may only attack the voluntary and intelligent character of the guilty plea. *Tollett v. Henderson,* 411 U.S. 258, 267 (1973).

On direct appeal, how can a guilty plea's voluntariness be reviewed? This matter usually will have to be discerned after the fact. Sometimes the plea record may not show that it is involuntary on its face. The only practical way is to have an evidentiary hearing in the trial court limited to the voluntariness of the plea.

This Court on more than one instance has held that the defendant was entitled to evidentiary hearings to vindicate constitutional rights. *See Franks v. Delaware,* 438

U.S. 154 (1978); *Jackson v. Denno*, 378 U.S. 368 (1968). An evidentiary hearing on direct appeal would promote judicial economy as well as be an important safeguard of constitutional rights. A guilty plea is just as important as a confession admitted at trial. Due Process should require that on direct appeal an appellant should have an evidentiary hearing to afford him the opportunity to show why his plea is constitutionally deficient. This Court has recognized that review by habeas corpus is an extraordinary remedy and will not be allowed to do service for an appeal. *Bousley*, ___ U.S. ___, 118 S. Ct. at 1610. The exceptional importance of this question mandates a grant of the Writ in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Appeals for the Ninth District.

Respectfully submitted,

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Howard W. Kolb

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-96-375 CR

HOWARD KOLB, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Court No. 71564

(Filed April 22, 1998)

OPINION

Howard Kolb pleaded guilty to possession of marijuana. The trial court made an affirmative finding of use of a deadly weapon and sentenced him to five years imprisonment in the Texas Department of Criminal Justice, Institutional Division. Kolb brings two points of error alleging his plea was involuntary.

A voluntary and understanding guilty plea entered without the benefit of a plea bargain waives all non-jurisdictional defects that occurred before the entry of the plea. *Jack v. State*, 871 S.W.2d 741, 742-44 (Tex. Crim. App. 1994) (explaining *Helms v. State*, 484 S.W.2d 925 (Tex. Crim. App. 1972)); *Lemons v. State*, 953 S.W.2d 825, 827 (Tex. App. – Corpus Christi 1997, no pet.). Kolb entered a plea of guilty without the benefit of a plea bargain. Therefore, our review is limited to the voluntary and understanding nature of the plea, jurisdictional defects that occurred before the entry of the plea, and matters that occurred after the entry of the plea. *Richardson v. State*, 921 S.W.2d 359, 360 (Tex. App. – Houston [1st Dist.] 1996, no pet.).

Under both points of error, Kolb argues his plea was involuntary under the due process clauses of the United States and Texas constitutions because the term "use" in section 12.35(c)(1) of the Penal Code does not encompass mere possession.[1] In other words, he alleges that simple possession is not "use" and therefore he pleaded guilty to a charge of which he was not guilty. Kolb cites *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274

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[1] An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. TEX. PEN. CODE ANN. § 12.35(c)(1) (Vernon 1994).

(1969), for the proposition that a plea is not voluntary or knowing if a defendant mistakenly pleads guilty to a charge which he did not commit.

The indictment stated that Kolb "intentionally and knowingly" possessed a usable quantity of marihuana and "in the same criminal episode the defendant used a deadly weapon, to-wit: a firearm." Use of a deadly weapon during the commission of the offense means that the deadly weapon was employed or utilized in order to achieve its purpose. *Tyra v. State*, 897 S.W.2d 796, 797 (Tex. Crim. App. 1995); *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989). Use of a deadly weapon during the commission of a felony offense refers to the wielding of a firearm with effect and to any employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony. *Patterson*, 769 S.W.2d at 941.

In the present case, the record does not reveal to what extent Kolb used the weapon during the commission of a felony. Although he asserted in the plea hearing that he did not "use" the firearm, there is no evidence in the record to establish that claim. Kolb confessed to the crime in writing and at the plea hearing. The record reflects Kolb was properly admonished and signed a judicial confession in accordance with TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 1989 & Supp. 1998). It is a settled point of law that a judicial confession standing alone is sufficient to sustain a conviction upon a guilty plea even if the defendant does nothing more than affirm that the allegations in the indictment are true and correct. *Dinnery v. State*, 592 S.W.2d 343, 353 (Tex. Crim. App. 1979); *Adam v. State*, 490 S.W.2d 189, 190 (Tex. Crim. App.

1973); *Lemons*, 953 S.W.2d at 828. There is no evidence in the record to establish that Kolb did not use the firearm in the commission of the felony. Accordingly, we are unable to determine whether Kolb pleaded guilty to a crime which he did not commit. His points of error are overruled. The judgment of the trial court is affirmed.

PER CURIAM

Submitted on April 2, 1998
Opinion Delivered April 22, 1998
Do not publish

Before Walker, C.J., Burgess, and Stover, JJ.

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701

Judgment entered April 22, 1998

Howard Kolb

vs No. 09-96-375 CR

The State of Texas

Appealed from the 252nd District Court of Jefferson County

Per Curiam

This cause came on to be heard on the transcript of the record of the Court below and the same being considered, because it is the opinion of this court that there was no error in the judgment; it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed and that the appellant pay all costs in this behalf expended and that this decision be certified below for observance.

/s/ Carol Anne Flores,
Clerk

APPENDIX B

[SEAL]
Court of Appeals
State of Texas
Ninth District

May 21, 1998

CHIEF JUSTICE
RONALD L. WALKER

JUSTICES
DON BURGESS
EARL B. STOVER

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CAROL ANNE FLORES

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Rodney D. Conerly
Asst. Criminal District Attorney
Jefferson County Courthouse
Beaumont, TX 77701

RE: Court of Appeals Number: 09-96-00375-CR
Trial Court Case Number: 71564

Style: Kolb, Howard

v.

The State of Texas

The Appellant's Motion for Rehearing in the above styled and numbered cause was overruled this date.

Sincerely,

CAROL ANNNE FLORES,
Clerk

cc: Beverly Dillard
Legal Assistant
Criminal District Court
Jefferson County Courthouse
Beaumont, TX 77701

APPENDIX C

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

December 2, 1998	AUSTIN	0.20
COA#: 09-96-00875-CR	DEC 02 '98	PB METER
RE: Case No. 1404-98	TX	7202132
STYLE: KOLB, HOWARD W.		U.S. POSTAGE

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

(JUDGE OVERSTREET WOULD GRANT)

BRUCE W COBB
P O BOX 22253
BEAUMONT TX 77720

APPENDIX D

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

February 8, 1999	AUSTIN	0.20
COA#: 09-96 00875-CR	FEB 03 '98	PB METER
RE: Case No. 1404-98	TX	7202132
STYLE: KOLB, HOWARD W.		U.S. POSTAGE

On this day, the Appellant's Motion for rehearing was denied.

Troy C. Bennett, Jr., Clerk

BRUCE W COBB
P O BOX 22253
BEAUMONT TX 77720

APPENDIX E

FILED

(344) (DA NO. 64873)
THE STATE OF TEXAS

VS.

HOWARD W. KOLB
(WMB) (DOB: 10-19-63)

CAUSE NO. 71564

OFFENSE
POSSESSION OF MARIHUANA
(SEC. 481.121 T.C.S.A.)

FILED
DISTRICT COURT OF
JEFFERSON CO. TEXAS

'96 FEB 29 P1:59

JOHN S. APPLEMAN
INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS for the County of Jefferson, State aforesaid, duly organized as such at the January Term, A.D., 1996, of the Criminal District Court of Jefferson County, in said County and State, upon oath in said Court present that HOWARD W. KOLB, on or about the 12th day of February, One Thousand Nine Hundred and Ninety-Six, and anterior to the presentment of this indictment, in the County of Jefferson and State of Texas, did then and there intentionally and knowingly possess a usable quantity of marihuana in an amount of five (5) pounds or less and more than four (4) ounces,

AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present in and to said Court,

at said term, that in the same criminal episode the Defendant used a deadly weapon, to-wit: a firearm,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ _____
FOREMAN OF THE
GRAND JURY